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REFERENCES TO SPRING'S CHAMPIONSHIP SPORTS IN JUDICIAL OPINIONS AND WRITTEN ADVOCACY

DOUGLAS E. ABRAMS¹

EARLY ONE MORNING, FOUR POLICE OFFICERS RESPONDED TO A CALL ABOUT A MELEE AT A HOME IN BRIGHAM CITY, UTAH. THROUGH A SCREEN DOOR AND WINDOWS, THE OFFICERS SAW A VIOLENT FIGHT AND A VICTIM SPITTING BLOOD INTO THE KITCHEN SINK. THE OFFICERS OPENED THE DOOR, ANNOUNCED THEIR PRESENCE, ENTERED THE KITCHEN, QUELLED THE ALTERCATION, AND MADE ARRESTS.

In *Brigham City, Utah v. Stuart* (2006), the Supreme Court unanimously held that the Fourth Amendment permitted the officers to enter the home without a warrant because they had an objectively reasonable basis for believing that an occupant was seriously injured or imminently threatened with such injury.² Writing for the Court, Chief Justice John G. Roberts, Jr. drew a reference to sports: "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."³

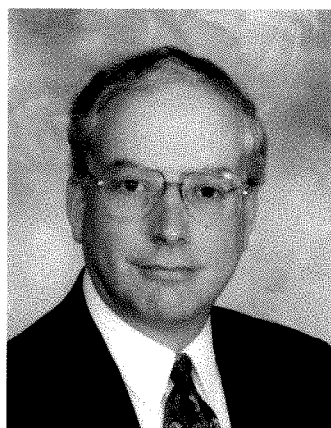
Fighting remains a feature of professional hockey games, though outside the rules. *Brigham City's* sports reference was unprompted because no mention of any sport appeared in the briefs of either party or any *amicus*.⁴

Chief Justice Roberts employed a rhetorical technique used by justices and lower federal and state judges with increased frequency since the early 1970s. In cases with no claims or defenses concerning sports, written opinions frequently help explain legal or factual decision making with references to the rules or

terminology of particular sports familiar to broad segments of the American people. The sports references add both spice and clarity.

The courts' own careful use of sports references invites advocates to carefully use sports references in their briefs and other written submissions. With the post-season playoffs and the World Series holding sports fans' attention, I wrote in the *Journal's* September-October 2016 issue about the role of baseball references in judicial opinions and written advocacy.⁵ As attention turned to post-season playoffs and the Super Bowl, I wrote in the January-February 2017 issue about football references.⁶

The trilogy of articles concludes here with a sampling of judges' recent references to four sports that hit high notes every Spring – *Basketball*, with the National Basketball Association playoffs and the National Collegiate Athletic Association (NCAA) men's and women's "March Madness"; *Golf*, with the U.S. Open Championship; *Hockey*, with the Stanley Cup playoffs and the NCAA men's and women's "Frozen Four" national championships; and *Horse racing*, with the Kentucky Derby, the Preakness Stakes, and the Belmont Stakes.



Douglas E. Abrams

Basketball

I was in the sixth grade on Long Island in early October of 1962 when the New York Knicks played a pre-season exhibition game in our local high school gymnasium against the Syracuse Nationals (which became the Philadelphia 76ers two years later). This was the first NBA game that most of my classmates and I ever saw in person.

Times have changed because NBA teams do not play in high school gyms any more. The league has grown into a national and international mammoth that dominates the airwaves and the print media. *Forbes* reports that basketball is "now second to soccer in worldwide popularity and the National Basketball Association (NBA) continues to play a major role in making this global growth a reality."⁷ College basketball also continues to thrive on campuses across the nation.

Courts have taken notice, frequently enhancing their opinions with references to the game generally, or to particular strategies, rules, and techniques.

General References

General references to basketball abound in the courts. In *Estate*

of *Diaz v. City of Anaheim* last year, for example, the U.S. Court of Appeals for the 9th Circuit reversed the judgment for the defendant city in a damages action arising from a fatal police shooting of a suspect.⁸ The district court had sustained the plaintiffs' objections to strike the city's testimony designed to inflame the jury.⁹ The court of appeals instructed the district court at any new trial to warn witnesses and lawyers, at a sidebar or during a brief recess, that any renewed effort by the city to elicit such testimony might trigger sanctions. The panel explained that "lawyers and witnesses, like misbehaving children or rattled basketball players, sometimes need a timeout."¹⁰

In *United States v. Del Toro-Barboza* (2012), the 9th Circuit rejected the convicted defendant's claim that remarks by the prosecutor during closing arguments denied him a fair trial.¹¹ The panel found the challenged remarks "vigorous," but "within the normal bounds of advocacy."¹² "A criminal trial, whether it should be or not, in practice is more like a football or basketball game than like a pleasant tea or game of croquet. The prosecution and defense confront each other and there will be some contact in strong language that is not avoidable [in] . . . a hard-fought contest."¹³

In *United States v. Papagno* (2011), the U.S. Court of Appeals for the District of Columbia Circuit rejected the government's motion that sought restitution from the defendant, who had been convicted of stealing computer equipment from the Naval Research Laboratory.¹⁴ The applicable statute requires payment of restitution by persons who "participated." The government contended that the term "participated" also reaches persons who "assisted," a term not found in the statute.

Papagno rejected the government's contention on the ground that "[i]n common parlance, the two terms are not equivalent."¹⁵ A hoops analogy followed. "Fans at a basketball game might help the home team win the game (and earn the title 'sixth man'), but even the fans who wear jerseys and are given the choke sign by the opposing team's star player do not participate in the game."¹⁶

Slam-Dunks

In *Randall v. Sorrell* in 2006, the Supreme Court held that two Vermont statutory provisions – one limiting amounts that candidates for state office could spend on their own campaigns, and the other limiting campaign contributions by other entities – violated the First Amendment Speech Clause.¹⁷ A central issue was whether the state legislature sought to insulate incumbents from effective opposition at the polls.

Dissenting Justice John Paul Stevens cited district court findings in another case that no Albuquerque, New Mexico mayor had been reelected in the 25 years since that city set campaign spending limits. Invoking basketball's term for a relatively easy score that overpowers the defense, Justice Stevens wrote that the uninterrupted pattern of defeat "cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage."¹⁸

Lower courts also frequently liken relatively easy acts or arguments to slam-dunks, though complications may raise difficulties under the basket or in a court of law. The U.S. Court of Appeals for the 7th Circuit found complications in *Jensen v. Clements* (2015).¹⁹

In Wisconsin state court, defendant Jensen was convicted of first-degree murder for killing his wife and making the death appear to be a suicide. On direct appeal, the state court of appeals affirmed on the ground that admitting challenged evidence constituted "harmless error."

The 7th Circuit affirmed the federal district court's grant of defendant Jensen's petition for a writ of habeas corpus. The federal court of appeals majority concluded that admission of the challenged evidence was unduly prejudicial (and thus not harmless error) because the case "was no slam dunk."²⁰ The majority explained that "[t]he evidence was all circumstantial. And there was significant evidence in support of [the defendant's] theory that [his wife] had taken her life. . . ."²¹ The *Jensen* dissenter agreed that the case "was not a slam dunk," but he would have deferred to the state courts' decision.²²

Akin to slam-dunks, courts sometimes distinguish between "layups" (relatively easy claims or arguments) and "three-point shots" (more difficult claims or arguments).²³ By the time a basketball player completes a layup for two points, the player typically faces limited or no resistance under the offensive basket; three-point shots pose greater challenge because players must launch the ball from considerably further away from the basket.

One federal circuit judge explains that direct testimony is subject to cross-examination and opposing witnesses because "there are no free-throws in criminal trials."²⁴

The Shot Clock and Stalling Tactics

The basketball shot clock deters stalling by requiring the offensive team controlling the ball to attempt a shot within a specified time period (24 seconds in the NBA or 30 seconds in NCAA men's and women's play), or else to turn over the ball to the opposing team.

In *Mulderink v. RSB Enterprises, Inc.* (2012), the federal district court held that the defendant automobile dealer had waived its contractual right to arbitrate the plaintiff purchaser's suit.²⁵ The court concluded that the dealer had "used the arbitration agreement as a stall tactic, the litigation equivalent of the four corners offense often used in college basketball before the NCAA adopted the shot clock in 1985."²⁶

The Full-Court Press

A full-court press is a defensive strategy that applies pressure and resistance up and down the court following the offensive team's inbounds pass.

In *Int'l Ass'n of Machinists and Aerospace Workers v. Verso Corp.* (2015), the federal district court held that the plaintiff labor unions and its employees had waived their rights to seek an interlocutory appeal because they had fully litigated claims in the district court instead of requesting interlocutory review earlier.²⁷ The plaintiffs "made the strategic choice to make a full court press in district court, rather than to obtain a quick trial court ruling and then proceed rapidly . . . to the Court of Appeals."²⁸

In *PIC Group, Inc. v. Landcoast Insulation, Inc.* (2010), another federal district court rejected the plaintiff's request for expedited disposition of its motion to compel discovery.²⁹ The court noted the parties' record of lengthy delays during the discovery process. "Whether the game is played at a slow pace or a full court press – and at times simultaneously – is not going to affect the Court's decisions, the ultimate goals of which are to avoid overtime."³⁰

Referees

Basketball referees also attract judicial attention. In *Blackfeet National Bank v. Nelson* (1999), for example, the U.S. Court of Appeals for the 11th Circuit rejected the plaintiff bank's claim that because the Federal Deposit Insurance Corporation fully insured an unmaturing certificate of deposit (to \$100,000) up to its maturity date, the CD was a bank deposit that the plaintiff could sell.³¹

"We cannot decide the nature of this instrument at its maturity date any more than a referee could decide the winner of a basketball game at halftime."³²

Golf

Courts have solid basis for assuming readers' familiarity with golf and its more prominent conventions. The game remains a popular "lifetime" or "carryover" sport, played by nearly 25 million Americans from childhood through adulthood.³³

Mulligans

The 7th Circuit describes the term "mulligan" this way: "A 'mulligan' is the practice of allowing a player who has made a bad shot to do it over, and the bad shot isn't shown on his scorecard. Mulligans are commonly allowed in informal golf matches (as opposed to tournament matches, in which mulligans are never permitted) because no harm is thought to be done by them in such matches."³⁴

When a claim or argument does not prevail the first time, parties and their lawyers might welcome a "do-over" that holds out the prospect of a more favorable result. In 2015, the term "mulligan" surfaced in the Supreme Court. The decision was *Alabama Legislative Black Caucus v. Alabama*, a challenge to alleged racial gerrymandering of Alabama state legislative districts.³⁵ Dissenting Justice Antonin Scalia asserted that the majority allowed the challengers to "take a mulligan" by ordering that the district court on remand consider a legal theory that he said the challengers had not argued below.³⁶

Lower courts have also drawn analogies to mulligans. In *Entek GRB, LLC v. Stull Ranches, LLC* (2016), for example, the U.S. Court of Appeals for the 10th Circuit underscored the importance of the law-of-the-case doctrine, which permits a court not to reconsider issues previously decided in the lawsuit.³⁷ The panel explained that "[w]ithout something like [the doctrine], an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve."³⁸

Teeing Up and Teeing Off

Similar to a golfer who sets down the ball in preparation to play a hole, a party may "tee up" evidence for the trial court,³⁹ or a lower court may "tee up" a record or precedent for appellate review.⁴⁰

Par for the Course

On substantive and procedural matters alike, performance by parties or counsel that meets positive or negative expectations may be "par for the course," the performance expected of a golfer on a particular hole. Performance below these expectations may produce a "bogey," one stroke over par for a hole on the golf course.⁴¹

In *Engquist v. Oregon Dep't of Agriculture* (2008), the Supreme Court rejected the employment discrimination claim because, as Chief Justice Roberts wrote for the majority, "treating seemingly similarly situated individuals differently in the employment context is par for the course."⁴² In *Metropolitan Insurance Co. v. Glenn* a week later, Justice Stephen G. Breyer, Jr.'s majority opinion specified that a product "falls below par" when it fails to meet expectations.⁴³

The U.S. Court of Appeals for the 5th Circuit says that abusive discovery requests are "lamentably par for the course in litigation."⁴⁴ The 4th Circuit says that "some amount of partisan politics is par for the course in [legislative] redistricting generally."⁴⁵ In a multi-defendant criminal prosecution, the 1st Circuit observed that "[p]ar for the course, most of the indicted defendants pleaded out prior to trial."⁴⁶ When it sanctioned the plaintiff's lawyer for bringing a baseless, vexatious employment discrimination suit, a federal district court explained that "as has become par for the course in this litigation, [the lawyer] has cited an unsupportive statutory provision for his argument."⁴⁷

Hockey

In the past generation or two, the National Hockey League has assumed a more prominent place on the American sports scene. Twenty-four of the NHL's 30 teams are now based in U.S. cities, and growing percentages of the league's players are American citizens or drawn from United States collegiate teams.⁴⁸ More than 600,000 players, coaches, and officials are enrolled in youth-league and other amateur programs under the auspices of USA Hockey, the sport's national governing body.⁴⁹

In 2014, a New Jersey state appellate court held that the state's chief justice seeking healthy caseload management could assign only retired judges who were provided by the executive branch. The court likened the chief justice's role to that of "a hockey coach who makes do with players selected by the team's general manager and owner. Unlike the dynamics of a professional sports team, the Chief Justice . . . cannot burnish the quality of the team by requesting a judge's trade, or demotion to the minor leagues."⁵⁰

In hockey (and a few other sports, such as soccer), a player registers a hat trick when the player scores three goals in one game. When events or arguments occur in threes, the court hearing a lawsuit may find that they constitute a "hat trick."⁵¹

As the Supreme Court did in *Brigham City* (discussed in the first paragraphs of this article), lower courts have cited professional hockey's reputation for fighting during games.⁵² Judges have also referenced hockey's penalty box, a small enclosed bench adjacent to the ice surface, but separate from the team's bench, where the offending player serves a penalty for an infraction.⁵³ A collateral party or witness may be entitled to an interlocutory appeal, for example, without having to wait in a "judicial penalty box" for the main suit to reach final judgment.⁵⁴

Brigham City is also typical of opinions that have drawn analogies to hockey referees. In *United States v. Rodriguez-Rivera* (2017), for example, the U.S. Court of Appeals for the 1st Circuit rejected the robbery defendant's contention that the district judge had favored the prosecution by interrupting defense counsel more often than she interrupted the prosecutor during their respective examinations of witnesses.⁵⁵ "[W]e do not consider this sort of comparison to be any more reliable an indicator of a biased judge than the relative number of penalties called against each side in a hockey game indicates a biased referee."⁵⁶

Horse Racing

Horse racing has been a popular spectator sport since America's colonial days.⁵⁷ Today, references to a race, its human and equine participants, or the exciting rush to the finish line can help describe parties' quest for a judgment or order.

When a party proceeds to court or begins trial, the party is "put through the paces," much as a jockey guides the horse through a race or practice run even before the race.⁵⁸ Where an

argument appears untenable on its face at the outset, the argument (as Justice Elena Kagan put it in 2014) “fails out of the starting gate,” the barrier that marks the start of a horse race.⁵⁹ In *Hsu v. Puma Biotechnology, Inc.* in 2016, the federal district court denied the defendants’ motion to dismiss the securities fraud complaint, but predicted a longer race: “[W]e’re out of the starting gate, off and running. Looming ahead, just around the turn, may be a summary judgment motion.”⁶⁰

Once out of the “starting gate,” a party with an apparent advantage before or during the lawsuit may gain the “inside track” and thus a shorter path to victory, much as gaining the inside track gives a race horse (or a medium- or long-distance track runner) a shorter path to the finish line because the inside is shorter than the outside.⁶¹

Where it nears completion, a proceeding or event enters the “home stretch,” the distance in a horse race from the last turn to the finish line.⁶² In *Fuller v. City of Oakland* (1995), for example, the 9th Circuit refused to permit the defendant to withdraw its jury trial demand after the trial began.⁶³ The court of appeals reasoned that permission would enable a party to preview its case before seeking “improved odds.”⁶⁴ The panel likened permission to “allowing a gambler to switch his bet as the horses reach the home stretch.”⁶⁵


Parties or events proceed “neck and neck” when they remain closely contested throughout a proceeding, similar to two horses that race in almost a tie toward the finish line.⁶⁶ When a party narrowly avoids missing a deadline, the party gets in “just under the wire,” much as a horse does when it barely edges out a competitor.⁶⁷ When a party suffers a narrow defeat in court, the party (like a horse that finishes only a few inches behind a competitor) loses “by a nose.”⁶⁸

In 2016, the North Carolina Court of Appeals explained that parties on appeal normally may not raise new arguments or claims for the first time because the party “may not swap horses after trial in order to obtain a thoroughbred upon appeal.”⁶⁹

Vivid, Lively, and Memorable

“Legal briefs are necessarily filled with abstract concepts that are difficult to explain,” Justice Scalia advised. “Nothing clarifies their meaning as well as examples” that “cause the serious legal

points you’re making to be more vivid, more lively, and hence more memorable.”⁷⁰

For judges and lawyers who write, sports examples fit the bill because the games that Americans play and watch qualify as vivid, lively, and memorable in all senses of the words. 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic 2016).

Portions of this article appeared in Douglas E. Abrams, *Sports In the Courts: The Role of Sports References in Judicial Opinions*, 17 VILLANOVA SPORTS & ENT. L.J. 1 (2010).

2 547 U.S. 398 (2006).

3 *Id.* at 406.

4 547 U.S. 398 (2006) (Briefs and Other Related Documents, available on Westlaw).

5 Douglas E. Abrams, *References to Baseball In Judicial Opinions and Written Advocacy*, 72 J. MO. B. 268 (2016).

6 Douglas E. Abrams, *References to Football In Judicial Opinions and Written Advocacy*, 73 J. MO. B. 34 (2017).

7 Benjamin Hancock, *The Globalization of the NBA*, FORBES (June 17, 2013, 8:52 AM), <https://www.forbes.com/sites/sap/2013/06/17/the-globalization-of-the-nba/#3708ad507135>.

8 840 F.3d 592 (9th Cir. 2016).

9 *Id.* at 598-601.

10 *Id.* at 604.

11 873 F.3d 1136 (9th Cir. 2012).

12 *Id.* at 1150.

13 *Id.*

14 639 F.3d 1093 (D.C. Cir. 2011).

15 *Id.* at 1098.

16 *Id.*

17 548 U.S. 230 (2006).

18 *Id.* at 280 n.4.

19 800 F.3d 892 (7th Cir. 2015).

20 *Id.* at 906.

21 *Id.*

22 *Id.* at 911 (Tinder, J., dissenting). See also, e.g., *Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1076 (9th Cir. 2015) (discussing “an otherwise slam dunk copyright violation”); *United States v. Ramirez-Rivera*, 800 F.3d 1, 33-34 (1st Cir. 2015) (“testimony did not make for a slam-dunk for the government by any means”); *Zimmerman v. Norfolk Southern Corp.*, 706 F.3d 170, 186 (3d Cir. 2013) (plaintiff’s claim was “far from a slam-dunk”); *United States v. Harris*, No. 15-cr-20089, 2016 WL 1745999, at *5 (E.D. Mich. May 3, 2016) (“the government’s case was far from a ‘slam dunk’”); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-CV-60649-GOOD-



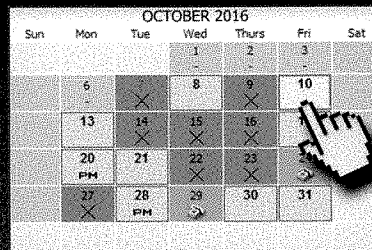
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MAN, 2015 WL 5449813, at *15 (S.D. Fla. Sept. 14, 2015) (suit was “not the slam-dunk case” because cited precedents’ facts were “significantly different” from those of the present suit).

23 E.g., *Foster v. Bridgestone Americas, Inc.*, No. 11-0175-WS-N, 2013 WL 489162, at *2 n.3 (S.D. Ala. Feb. 8, 2013).

24 *Pinholster v. Ayers*, 590 F.3d 651, 707 (9th Cir. 2009) (Kozinski, C.J., dissenting, rev’d on other grounds, 131 S. Ct. 1388 (2011)).

25 No. 10 C 7978, 2012 WL 1205728 (N.D. Ill. Apr. 11, 2012).

26 *Id.* at *2, citing https://en.wikipedia.org/wiki/Four_corners_offense (defining “four corners offense”). See also, e.g., *NIHC, Inc. v. Comptroller of the Treasury*, 97 A.3d 1092, 1092-93 (Md. 2014) (“Once upon a time, before the advent of the shot clock, some basketball teams employed a maneuver known as the ‘four corners offense.’”).

27 121 F. Supp.3d 201 (D. Me. 2015).

28 *Id.* at 228. See also, e.g., *United States v. McCarther*, 596 F.3d 438, 442 (8th Cir. 2010) (“The government is not required to put on a full court press on the evidence at a pretrial motion hearing.”); *Stuckey v. Nat’l Union Fire Ins. Co.*, No. 15 Civ. 6639 (CMJ), 2015 WL 5547441 (S.D.N.Y. Sept. 17, 2015) (questioning whether the plaintiff “behaved reasonably by not putting on a full-court press to ascertain” whether the institution that employed him maintained an insurance policy that might provide relevant coverage).

29 No. 1:09cv662-KS-MTP, 2010 WL 4791710 (S.D. Miss. Nov. 18, 2010).

30 *Id.* at *1 n.6.

31 171 F.3d 1237, 1240 n. 5 (11th Cir. 1999).

32 *Id.* See also, e.g., *Tejada v. Dubois*, 142 F.3d 18, 24-25 (1st Cir. 1998) (granting federal habeas corpus relief to defendant convicted in state court; held that he was prevented from presenting an effective defense because the trial judge and defense counsel had provoked each other throughout the trial; the panel found itself “in much the same position as a basketball referee who sees a player throw an elbow at an adversary but cannot tell if the blow was the initial foul or a retaliatory strike. . . . But unlike the basketball referee, we have no need to decide whether to assess a single foul or a double foul.”); *Liberty Mut. Ins. Co. v. Constr. Mgmt. Servs., Inc.*, No. 99 C 6906, 2001 WL 1159203, at *7 (N.D. Ill. Sept. 28, 2001) (“a stakeholder is to a ‘stake’ he controls as a basketball referee is to a jump-ball. He holds it, but he does not claim it for his own. Rather, he willingly allows the rival contestants to fight for it”).

33 E.g., Mike Stachura, *Number of Golfers Steady, More Beginners Coming From Millennials*, GOLF DIGEST (Apr. 30, 2015), available at <http://www.golfdigest.com/story/number-of-golfers-steady-more>.

34 *Donnawell v. Hamburger*, 803 F.3d 912, 914 (7th Cir. 2015).

35 135 S. Ct. 1257 (2015).

36 *Id.* at 1275 (Scalia, J., dissenting) (“The Court rightly concludes that our racial gerrymandering jurisprudence does not allow for statewide claims. However, rather than holding appellants to the misguided legal theory they presented to the District Court, it . . . remand[s] the case with orders that the District Court consider whether some (all?) of Alabama’s 35 majority-minority districts result from impermissible racial gerrymandering.”).

37 840 F.3d 1239 (10th Cir. 2016).

38 *Id.* at 1240. See also, e.g., *United States v. Pryor*, 842 F.3d 441, 451 (6th Cir. 2016) (“Where the defendant through his own actions does not permit the court to ascertain whether a waiver [of the right to counsel] is knowing or voluntary, or even if he means to waive at all, he cannot use the court’s failure to acknowledge the waiver later to take a mulligan and try his case again if he loses.”); *Arras v. Regional School Dist. No. 14*, 125 A.3d 172, 180 (Conn. 2015) (affirming summary judgment for defendants in suit that challenged referendum results on the ground that towns failed to publish warning of the referendums in accordance with state law; plaintiffs sought “the electoral equivalent of a mulligan”); *GMAC Mort., LLC v. Palenzuela*, 208 So.3d 181 (Fla. Dist. Ct. App. 2016) (“[J]ust as in the rules of golf, there are no mulligans in contested legal cases. With rare exceptions, you either prove your case by the close of the evidence at an evidentiary hearing or trial, or you don’t.”).

39 E.g., *Chubb & Son v. Superior Ct.*, 228 Cal.App.4th 1094, 1099 (2014).

40 E.g., *Armin v. Riverside Community Hosp.*, 5 Cal.App.5th 810, 821 (2016); *McCormick v. Carrier*, 795 N.W.2d 517, 569 (Mich. 2010).

41 *Enzo Therapeutics, Inc. v. Yeda Research & Dev. Co.*, 477 F. Supp.2d 699, 717 (E.D. Va. 2007) (plaintiff that unnecessarily prolonged the proceedings failed to meet the court’s expectations).

42 553 U.S. 591, 604 (2008).

43 554 U.S. 105, 114 (2008).

44 *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 677 (5th Cir. 2016).

45 *Raleigh Wake Citizens Ass’n v. Wake County Bd. of Elections*, 827 F.3d 333, 347

(4th Cir. 2016).

46 *United States v. Ramirez-Rivera*, 800 F.3d 1, 14 n.5 (1st Cir. 2015).

47 *Keister v. PPL Corp.*, No. 4:13-cv-00118, 2015 WL 9480455, at *6 (M.D. Pa. Dec. 29, 2015). See also, e.g., *CTI Sys., S.A. v. Global Finishing Solutions, LLC*, No. 14-cv-744-jdp, 2016 WL 110605, at *4 (W.D. Wisc. Jan. 8, 2016) (“The parties conducted international depositions via video conferencing, briefed summary judgment, and produced thousands of documents. But that is all par for the course in federal litigation. . . .”); *McNeil v. Hayes*, No. 1:10-cv-01746-AWI-SKI PC, 2013 WL 2434702, at *1 (E.D. Cal. June 4, 2013) (“Detailed, time consuming, contentious discovery issues are par for the course in many civil actions.”).

48 See National Hockey League Standings, <https://www.nhl.com/standings> (visited Apr. 10, 2017); Dean Spiros, *The Top Players in the WCHA Are Leaving School Earlier Each Year, Weakening Teams and Hurting Graduation Rates*, STAR TRIBUNE, Jan. 14, 2007, at 1C.

49 USA Hockey, Membership Statistics, <http://www.usahockey.com/page/show/839306-membership-statistics> (visited Apr. 10, 2017).

50 *State v. Buckner*, 896 A.3d 261, 288 n.16 (N.J. Super. Ct. A.D. 2014).

51 E.g., *U.S. v. Faulkenberry*, 614 F.3d 573, 589 (6th Cir. 2010); *Boren v. Taylor*, 206 So.3d 892, 900 (La. Ct. App. 2016).

52 E.g., *Martinez v. Hooper*, 148 F.3d 856, 857 (7th Cir. 1998) (“We know the story about the surprised audience that went to see a fight and a hockey game broke out.”); *Galvez v. Barnes*, No. SACV 12-897-JVS (OP), 2012 WL 6645608, at *2 (C.D. Calif. Nov. 13, 2012).

53 E.g., *Modern Fence Techs., Inc. v. Qualipac Home Improvement Corp.*, No. 08-C-0543, 2011 WL 2532486, at *8 (E.D. Wis. June 24, 2011) (magistrate judge’s opinion) (discussing “the penalty box of [28 U.S.C.] § 1927”); *In re Dole Food Co., Consolidated No. 8703-VCL, Consolidated No. 0979-VCL*, 2015 WL 5052214, at *5 (Del. Ct. Chan. Aug. 27, 2015) (discussing how dominant shareholder might put the company’s objecting bankers into the “penalty box”).

54 *Marsh v. Mountain Zephyr, Inc.*, 50 Cal. Rptr.2d 493, 499 (Ct. App. 1996). See also, e.g., *Nilssen v. Motorola, Inc.*, 130 F. Supp.2d 976, 982 n.11 (N.D. Ill. 2000) (“the law has no equivalent of the penalty box in hockey, in which a lawyer (or the lawyer’s client) could somehow suffer some adverse consequence or having committed a foul (in this instance, for advancing a truly frivolous argument”).

55 473 F.3d 21 (1st Cir. 2007).

56 *Id.* at 27.

57 E.g., SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 70, 148-49, 471, 669, 786-87 (1965).

58 E.g., *U.S. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *Johnson v. Smithkline Beecham Corp.*, No. 11-5782, 2015 WL 1004308, at *13 (E.D. Pa. Mar. 9, 2015); *Palacios v. United States*, No. 4:12-CV-737-Y & No. 4:10-CR-188-Y(01), 2013 WL 1744244, at *2 (N.D. Tex. Apr. 23, 2013).

59 *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2014, 2034 n.6 (2014). See also, e.g., *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (legally deficient arguments could not get “out of the starting gate”); *U.S. v. McGill*, 815 F.3d 846, 944 (D.C. Cir. 2016) (same); *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898, 907 (8th Cir. 2010) (same); *Zia v. CitiMortgage, Inc.*, No. 15-cv-23026-GAYLES, 2016 WL 5369316, at *5 (S.D. Fla. Sept. 26, 2016) (same); *In re Halverson*, 362 S.W.3d 443, 451 (Mo. Ct. App. 2012) (same).

60 No. SACV 15-0865 AG (JCGx), 2016 WL 5859000, at *9 (C.D. Cal. Sept. 30, 2016).

61 E.g., *Lott v. Pfizer, Inc.*, 492 F.3d 789, 794 (7th Cir. 2007); *NRDC, Inc. v. U.S. Dep’t of Interior*, 36 F. Supp.3d 384, 411 (S.D.N.Y. 2014); *Lee v. Citibank*, No. 12-CV-566-A, 2012 WL 5305206 (W.D.N.Y. Oct. 25, 2012).

62 E.g., *Organized Village of Kake v. United States Dep’t of Agric.*, 795 F.3d 956, 986 (9th Cir. 2015) (Kozinski, J., dissenting) (“we are in the home stretch of the Obama administration”). See also, e.g., *Burton v. Pa. State Police*, 990 F. Supp.2d 478, 514 (M.D. Pa. 2014) (“the court will persist through the home stretch and engage Plaintiff’s final arguments”), aff’d, 612 Fed. Appx. 124 (3d Cir. 2015).

63 47 F.3d 1522 (9th Cir. 1995).

64 *Id.* at 1532.

65 *Id.*

66 *Carpenter v. Kenneth Thompson Builder, Inc.*, 186 So. 3d 820, 827 n.8 (Miss. 2015).

67 E.g., *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2015); *Minasayan v. Mukasey*, 553 F.3d 1224, 1228 (9th Cir. 2009); *Bayer Healthcare Pharms., Inc. v. River’s Edge Pharms., LLC*, No. 1:11-CV-1634-LMM, 2015 WL 11142428 (N.D. Ga. Sept. 22, 2015); *Peterson v. Islamic Republic of Iran*, 290 F.R.D. 54, 58 (S.D.N.Y. 2013).

68 E.g., *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dep’t of Natural Res.*, 661 N.W.2d 858, 868 (Wis. 2003).

69 *State v. Collins*, 782 S.E.2d 350, 358 (N.C. Ct. App. 2016) (citations omitted).

70 ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 111, 112 (2008).